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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 25

J. C. FAIRLEY, ET AL.,
Appellants,

vs.

JOE T. PATTERSON, ET AL.,
Appellees.

LEVI MARSAW, III, ET AL.,
Appellants,

vs.

JOE T. PATTERSON, ET AL.,
Appellees.

ON APPEAL FROM A DISTRICT COURT OF THREE JUDGES,
UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI

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BRIEF FOR APPELLEES

STATEMENT OF THE CASE

These consolidated cases deal solely with the applicability of Section 5 of the Voting Rights Act of 1965 to Section 2870 of the Mississippi Code.

Section 170 of the Mississippi Constitution of 1890 provides:

> "Each county shall be divided into five districts, a resident freeholder of each district shall be selected, *in the manner prescribed by law*, and the five so chosen shall constitute the Board of Supervisors of the county, a majority of whom may transact business." (Emphasis added)

Prior to May 27, 1966, each of the Members of the Boards of Supervisors in each of the Counties of Mississippi, including the Appellees, Adams and Forrest Counties, were elected by the qualified electors from their respective districts pursuant to Section 2870 of the Mississippi Code and Section 170 of the Constitution of Mississippi of 1890.

Pursuant to the authority granted the Legislature of Mississippi by Section 170 of the Mississippi Constitution of 1890, effective May 27, 1966, the Legislature of Mississippi amended Section 2870 to provide that Members of the County Board of Supervisors could, at each county's option, be elected at large on a county-wide basis by all qualified electors of the County, and, in good faith, the legislative amendment mandatorily required that if 20% of the qualified electors of the County shall present to the Board of Supervisors a petition objecting to such alternative method within sixty days after the adoption and final publication of any such alternative method, then the Board of Supervisors must call an election, after due notice provided, and the question on the ballot shall be whether the members of the Board of Supervisors shall be elected at large or by districts. The actions of the Appellees, Adams and Forrest Counties, in adopting the "at large" method of election of their Supervisors completely complies with the "one-man, one-vote" mandate of this Court. Moreover, the

legislative purpose in adopting the amendment of 1966 was to allow the several counties a method of complying with the mandate of this Court of "one-man, one-vote."

Appellants in their original Complaint asserted a second claim for relief claiming that the Amendment to Section 2870 of the Mississippi Code, and the action taken pursuant thereto by the Appellees, had the purpose and effect of denying or abridging on account of race or color the right to vote of the individual Appellants and the class they purported to represent and further charged said actions prevented the election of Negro candidates to the County Boards of Supervisors and that the said actions deterred potential Negro candidates from running for the Office of County Supervisor in said Counties. This second claim was *dismissed upon the voluntary Petition For Dismissal of the Appellants.*

SUMMARY OF ARGUMENT

This Court has before it the following propositions for decision on this appeal:

1. Whether a three-judge court was properly convened for the trial below and therefore whether an appeal lies directly to this Court.

2. Whether the controversy contained in the Complaint is moot in view of the fact that the Attorney General of the United States has made no objection to the enactment and enforcement of Section 2870 of the Mississippi Code of 1942, as amended, within sixty days of being informed thereof.

3. Whether Section 5 of the Voting Rights Act of 1965 entitles private parties to initiate proceedings for enforcement of said Section.

4. Whether Mississippi Code, Annotated, Section 2870, as amended, and the actions of Forrest and Adams Counties thereunder fall within the purview of Section 5 of the Voting Rights Act of 1965.

5. Whether, assuming that the Appellees are wrong in all other contentions made by them in this Brief, this Court should in equity and good conscience, set aside the elections of November, 1967.

As to Proposition No. 1, Appellees contend that this Court does not have jurisdiction of these actions because the three-judge district court was improperly convened. In order to properly convene a three-judge district court there must be specific statutory authority therefor. That authority is wholly lacking in the actions filed below. Nowhere in Section 5 of the Voting Rights Act does there appear any authority, stated or by necessary implication, for the convening of a three-judge district court other than in an action for declaratory judgment at the suit of a state or its political subdivision and then only in the United States District Court for the District of Columbia.

As to Proposition No. 2, Appellees contend that Section 5 of the Voting Rights Act allows the implementation of a statute when the Attorney General of the United States makes no objection thereto within sixty days after being informed thereof. Appellees contend that the Attorney General has been informed of the enactment and implementation of Section 2870 of the Mississippi Code of 1942, as amended, for more than sixty days and has made no objection thereto.

As to Proposition No. 3, Appellees urge that Section 5 of the Voting Rights Act neither could nor attempted to vest in private individuals the authority to institute proceedings to enforce the Section. It is clear from a reading

of the Voting Rights Act that such authority is bestowed solely upon the Office of the United States Attorney General. To read the Section as Appellants contend is to authorize a suit by a private individual against a sovereign state of the Union. Such a suit would contravene the most basic principles of established law.

As to Proposition No. 4, Appellees contend that Section 2870 of the Mississippi Code of 1942, as amended, by the 1966 Session of the Mississippi Legislature and the actions taken thereunder by the Counties of Forrest and Adams do not come within the purview of Section 5 of the Voting Rights Act of 1965 since said Section 5 deals entirely with changes in the registration and/or voting processes of a state or political subdivision thereof. The changes brought about by said Section 2870 and the actions taken thereunder by the said Counties in nowise affect the registration and/or voting procedures of the State of Mississippi or the said Counties which were in effect prior to November 1, 1964. Said Section and actions thereunder deal entirely with redistricting which subject matter is not governed or controlled by the said Voting Rights Act, as reflected by the language of said Act, the Congressional debates, the Congressional hearings, Court decisions involving the said Act, the case of *South Carolina* v. *Katzenbach*, 383 U.S. 301, and the contention of the Attorney General in *Apache County* v. *United States*, 256 F. Supp. 903.

5. As to Proposition No. 5, Appellees contend that even in the event this Court should find that Appellees are wrong in all of the above contentions that this Court should not void the elections held in November, 1967, for the Office of Supervisor in the Counties of Adams and Forrest in view of this Court's teachings in *Sims* v. *Reynolds*, 377 U.S. 533, *Roman* v. *Sincock*, 377 U.S. 695 and *Davis* v. *Mann*, 377 U.S. 678. To do otherwise would disrupt the orderly conduct of county government in the two Counties affected.

ARGUMENT

I.

Jurisdiction—Whether Three-Judge District Court Was Properly Convened

The threshold question before the Court, the consideration of which was postponed to the merits, is whether this Court, rather than the Court of Appeals, has jurisdiction to review the district court's determination, and this in turn depends on whether a three-judge court was required. Appellants assert that it was not.

The authority, if it exists, for convening the three-judge district court in these actions must be conferred by Section 5 of the Voting Rights Act of 1965. (42 U.S.C. 1973c) The question of the convening of three-judge district courts in these actions outside the authority conferred, if such authority is conferred, by Section 5 of the Voting Rights Act is foreclosed by this Court's decision in *Swift & Co.* v. *Wickham*, 382 U.S. 111.

All counsel at bar appear to be in accord that the jurisdiction of the Three-Judge District Court and thereby the jurisdiction of this Court rest upon the construction to be given the last sentence of Section 5 of the Voting Rights Act of 1965 (42 U.S.C. 1973c) here quoted for ready reference by the Court:

> "Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court."

Section 5 of the Act provides for only one kind of action—an action by a state or its political subdivisions with respect to which the prohibition set forth in Section

4(a) is in effect for a declaratory judgment that any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, which said state or political subdivision enacts or seeks to administer does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color. Section 5 further provides, and all counsel at bar agree, that the court before which said action shall be heard is the United States District Court for the District of Columbia, and that said Court shall be a three-judge court and any appeal shall lie to this Court.

The quoted language of Section 5 is plain and unambiguous. The phrase, "any action under this Section" can only mean any action the institution of which is authorized by and instituted pursuant to the provisions of said Section. Far from Appellant's contention that the phrase "any action" suggests more than a declaratory judgment action, the phrase in its ordinary and accepted meaning unequivocally limits the mandate for a three-judge court to actions "under" or pursuant to this Section.

Appellants, at page 8 of their last filed Brief, adopt the rationale of MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE, pages 8 and 9. There the Solicitor General urges that since the above quoted language of Section 5 is separated from the opening sentence of the Section, its location has some significance. Appellees submit that not only does the sentence appear in the most logical place, but that its location lends support to the argument that it was the intention of Congress that the language apply to no actions other than actions for declaratory judgments. Moreover, it is clear that the phrase "any action" as contained in Section 5 applies only to the actions authorized by the Section since the sentence

is not even a separate paragraph within the Section but is a part of the one paragraph which makes up the entire body of Section 5. In fact, the quoted sentence is in no manner separated from the body of the Section.

If Congress had intended, as Appellants urge, that jurisdiction be conferred on the three-judge court in the instant case, the statute, too easily, could have been drafted to so provide. Appellants argue that the last sentence of Section 5 must be read to permit a suit by aggrieved individuals alleging a violation of Section 5 to be filed in the district court of the district in which violation by a state or its subdivision is alleged to have occurred and that thereupon the district judge must convene a court of three judges to hear the suit. Nowhere in Section 5 can be found a mention of any court other than the United States District Court for the District of Columbia. Section 5 is a specific enlargement of the general jurisdiction of the Federal Courts. In enacting Section 5, Congress did so in light of the provision of Section 2281. (28 U.S.C.) To adopt the construction of the last sentence of Section 5 urged by Appellants is to engraft by strained inference upon the jurisdiction of United States district courts other than that of the District of Columbia a special and an enlarged jurisdiction without express provision therefor in the statute.

The Section, as written, contains no enforcement provision. As a matter of fact, the only provision for enforcement of Section 5 that appears in the Act is Section 12(d) and that provision authorizes only the United States Attorney General to institute "an action for preventive relief, including an application for a temporary or permanent injunction, restraining order, or other order, and including an order directed to the State and State or local election officials to require them (1) to permit persons listed under

this Act to vote and (2) to count such votes." Paragraph (f) of the same Section provides that the district courts of the United States shall have jurisdiction of such proceedings. It does not provide for a three-judge court as does Section 10(c) for action brought under Section 10. It must be concluded that the only enforcement of Section 5 contemplated by the Act is pursuant to Section 12(d) and further, in the absence of a specific recitation by Congress providing for a three-judge court, that all enforcement proceedings shall be vested in the United States District courts, one judge sitting.

Appellants allude to the language in Section 5 of the Act, "subsequent action to enjoin enforcement of such qualification." This language is taken out of context and thereby loses its meaning completely. Said language was inserted in Section 5 of the Act to make plain that the Attorney General could bring a subsequent action to enjoin the enforcement of such qualification, prerequisite, standard, practice or procedure, if said enforcement was in violation of the Constitution of the United States. Appellants assert that "such an action would be under the Fifteenth Amendment, and would, therefore require a three-judge court under 28 U.S.C. 2281 in any event," therefore making the last sentence of the paragraph superfluous. This contention is without merit since the said subsequent action by the Attorney General contemplated by the above quoted language would be based not upon the ground that the qualification, prerequisite, standard, practice or procedure is unconstitutional, but that they are enforced in an unconstitutional manner. It is elemental that 28 U.S.C. 2281 does not control an action wherein the ground for said action is unconstitutional enforcement rather than unconstitutionality of the law itself. *Phillips* v. *United States*, 312 U.S. 246.

The Court's attention is invited to Section 14(b) of the Act. We find therein the language that:

> "[N]o court other than the District Court for the District of Columbia . . . shall have jurisdiction to issue any *declaratory judgment* pursuant to . . . Section 5 . . ." (Emphasis added)

Since the actions now on review before this Court are actions requesting declaratory judgments if such are "under" or "pursuant to" Section 5 of the Act, then jurisdiction to hear said actions would rest exclusively in the District Court for the District of Columbia. Said Section 14(b), if it means what it says, would appear to be the death knell to Appellants' argument that the present actions were brought "under" or "pursuant to" Section 5 of the Act.

Appellants assert in their Brief at Page 9 that:

> "[T]he purpose of the Voting Rights Act of 1965 and of three-judge courts in general support Appellants' contention that all actions related to Section 5 must be heard by a three-judge court."

This statement vividly points up Appellants' apparent misconception of the thrust of the said Act and the legal and constitutional theories upon which the Act was predicated. The proviso in Section 5 of the Act which requires a state or political subdivision to first obtain the approval of the Attorney General or in the absence of such approval, the approval of the United States District Court for the District of Columbia before enacting or administering voting laws different from those in effect prior to November 1, 1964, is based upon the "freezing" principle. A suit by the Attorney General, as contemplated by Section 5 of the Act, to enjoin the operation and enforcement of new voting laws until such laws are first submitted to the Attorney General or the United States District Court for the District

of Columbia does not draw into question the constitutionality of such voting laws, and therefore does not come within the ambit of the concern expressed by Congress in the enactment of 28 U.S.C. 2281. The actions now before this Court are not actions seeking an injunction against the enforcement of Section 2870, Mississippi Code, Annotated, 1942, as amended, and/or the actions taken thereunder by Adams and Forrest Counties on the ground that said Section or said actions are unconstitutional. This Court is not here confronted with a combat or clash between the sovereign state and/or political subdivision thereof and individuals in the constitutional arena. It is worthy to note that in actions brought by the United States under 42 U.S.C. 1971 in which the Attorney General requests a finding of a pattern or practice of discrimination, the Attorney General or any Defendant in such actions may request that a court of three judges be convened to hear and determine the entire cases. This proviso was inserted in said Section 1971 because the United States District Courts hearing and determining such cases could suspend, if they deemed necessary, certain voting laws of a state or political subdivision or portions thereof. But before the Courts could suspend such laws they must first find that such laws were being unconstitutionally administered. In the actions now before the Court no such finding is necessary, therefore such actions do not even rise to the same dignity as those under 42 U.S.C. 1971. Even under said Section 1971 the convening of a three-judge district court was not mandatory.

It was necessary to place in Section 5 of the Act the proviso in regard to the convening of a court of three judges because the court action contemplated by said Section is one whereby, as a practical matter, an adverse finding as to the Plaintiff by the United States District Court for the District of Columbia would be tantamount to the issuance

of an injunction enjoining the enforcement and operation of certain state laws because they have the purpose and will have the effect of denying or abridging the right to vote on account of race or color. Though this would be the practical effect of such a holding by the said District Court it would not technically come within the provisions of 28 U.S.C. 2281 because no judicial injunction is sought or issued since the injunction against the enforcement of such laws is the legislative injunction contained in the Act. Therefore, Congress deemed it appropriate to assert in said Section 5 of the Act, the last sentence which is now before this Court for construction. The congressional concern for this technical point is evidenced by the colloquy between Senator Ervin and Attorney General Katzenbach found at Pages 48-49 of the Hearings Before the Committee on the Judiciary, United States Senate, Eighty-Ninth Congress, First Session, which though directed to Section 4(a) of the Act is equally applicable to Section 5. A portion of said colloquy is here quoted for the benefit of the Court:

> "SENATOR ERVIN. But that is what the district court is here for, to determine whether denial or abridgment has occurred. At least, theoretically, they are here to give a person a chance to prove that he has not done that.
>
> ATTORNEY GENERAL KATZENBACH. Senator, my reason for interpreting it this way would be that you do not get that kind of a judgment under this procedure in a previous paragraph. The only thing you can get under it is a declaratory judgment that you have not. You do not get a judgment that you have. Therefore, I would not have thought that this would have applied. But if the point is not clear, we ought to make it clear, I agree with you.
>
> They seek a declaratory judgment that they have not; there is evidence that they have. The court denies the declaratory judgment that they have not. There is no judgment made that they have."

Further, at Page 71 of said Hearings, we find the following colloquy between Senator Ervin and Attorney General Katzenbach:

> "SENATOR ERVIN. Is it the purpose of this bill to deny the district judge the right to try one of these cases by him or based upon—
>
> ATTORNEY GENERAL KATZENBACH. No. I think the three-judge court is surely appropriate. You are testing here a constitutional question—
>
> SENATOR ERVIN. And I—
>
> ATTORNEY GENERAL KATZENBACH (continuing). On denial or abridgment. It goes into the 15th amendment question and I think the use of the three-judge court is quite appropriate. I didn't mean to cast any aspersions by drafting it this way."

On several occasions courts in the Fifth Circuit have determined the question as to what actions taken by a state or political subdivision thereof come within the purview of the Voting Rights Act of 1965 without convening a court of three judges. In *Davis* v. *Gallinghouse,* 246 F. Supp. 208, a one-judge district court determined that documentation of residence did not come within the Voting Rights Act ban on tests and devices. In *United States* v. *Ward,* C.A. La., 1965, 352 F.2d 359 and *United States* v. *Ramsey,* C.A. Miss., 1965, 353 F.2d 650, the Court of Appeals for the Fifth Circuit remanded cases to one-judge district courts to enjoin the enforcement and operation of certain state statutes on the ground that they came within the proscription of the Voting Rights Act of 1965.

None of the reasons which brought about the enactment by Congress of 28 U.S.C. 2281 underlay an action wherein the conflict is between a state statute and a federal statute rather than a state statute and the Constitu-

tion of the United States. In the actions now before this Court the conflict is between a state statute and actions thereunder and a federal statute and do not involve a conflict between a state statute and actions thereunder and the Constitution of the United States.

II.

This Action Is Moot Since the Attorney General Has Failed to Interpose Any Objection to Section 2870 of the Mississippi Code As Amended or the Actions Taken Thereunder Within Sixty Days After Said Changes Were Brought to His Attention

Section 5 of the Voting Rights Act of 1965 provides:

> "[T]hat such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, or procedure has been submitted by the Chief Legal Officer or other appropriate official of such state, or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission . . ."

It will be noted that while neither the State of Mississippi, Forrest County nor Adams County has submitted to the Attorney General of the United States Section 2870, Mississippi Code, as Amended in the 1966 Legislative Regular Session, and/or the actions taken under said Section by Adams and Forrest Counties, such submission has been made by the Order of this Court of March 11, 1968, inviting the position of the United States as to this matter. To this date, being more than sixty days from said submission, the Attorney General has not interposed any objection to said Section and/or said actions thereunder. Even though the United States accepted the invitation to file a Memorandum, which Memorandum was filed more than sixty days after this Court's Order of March 11, 1968,

it still did not interpose an objection. In that particular, the situation in these cases is in nowise different from the situation which existed wherein the altered Voting Laws of South Carolina were approved by the Attorney General although never submitted by the State of South Carolina for jurisdictional review in the District Court for the District of Columbia nor to the Attorney General for his scrutiny. See *South Carolina* v. *Katzenbach*, 383 U.S. 301, 320.

The United States in its Memorandum at Page 15 states that:

> "[S]ince Section 5's approval procedure was designed to serve an informing function—to provide a method of bringing to the attention of the Government changes in state law' (Assistant Attorney General Marshall's House Hearings, Page 72), . . ."

The import of this interpretation of Section 5's approval procedure, placed upon it by the United States, is that when the Attorney General is "informed" of a change in state voting laws that the method by which he is "informed" is of no consequence and the sixty day period in which he may object to the change as provided for in said Section commences to run upon his being so "informed." We suggest to the Court that the Attorney General received the information regarding said Section 2870 of the Mississippi Code and the actions taken under said Section by Adams and Forrest Counties in the same and like manner, i.e., a proceeding in this Court, as he received the information regarding the change or changes in the Voting Laws of South Carolina which he affirmatively approved in *South Carolina* v. *Katzenbach*, supra. We suggest that his failure to object in these cases is tantamount to his affirmative action in *South Carolina* v. *Katzenbach*. Therefore, Appellees and this Court must

"assume[d] from past silence [is] that the Attorney General was not prepared to interpose an objection to the changes being effected, and thus declined to seek to compel a State or political subdivision to comply with what would have in all likelihood been a wholly formalistic step that would merely have delayed final implementation of a constitutionally required restructing of government." (Memorandum for United States, Page 22)

We reiterate that the Attorney General has not to this date interposed an objection even though he was afforded an opportunity by this Court to so do.

Nowhere in the Memorandum of the United States is an objection registered to Section 2870, Mississippi Code and/or the actions taken thereunder. In fact, the United States affirmatively asserts that:

> "[O]ur (The United States') submission (of this memorandum), of course, does not reach the ultimate issue of the validity of the challenged State laws; . . ." (Memorandum for the United States, Page 11).

We hasten to acknowledge that the United States continues by asserting that the question of validity would have to be "resolved by the District Court for the District of Columbia if the Attorney General, upon investigation, *shall determine to interpose objection.*" (Memorandum for the United States, Page 11) (Emphasis added) But we suggest that any objections, if such should materialize, must be interposed as the basis for an independent suit by the United States to enjoin the operation and enforcement of Section 2870 of the Mississippi Code and/or actions taken under and by virtue of said section (see *United States* v. *Mississippi*, 380 U.S. 128) since the sixty day period which in the Attorney General (United States) could have interposed an objection under and by virtue

of Section 5 of the Act has elapsed. We submit that the apparent attempt by the Attorney General (United States) to extend its right (conferred by Section 5) to interpose objections beyond the sixty day period provided for in the said section must fail when viewed in light of the obvious purpose and reason for inserting this period of limitation upon the exercise of said right. Obviously, Congress was of the mind that this "uncommon exercise of congressional power"; except under exceptional circumstances "not appropriate" legislation; which reposes in the Attorney General of the United States veto power over certain legislative acts of sovereign states must be exercised, if exercised at all, with diligence and dispatch. Congress by inserting the sixty day period of limitation admonished the Attorney General that not only could he not sleep on this "uncommon" right but that that he could not even "doze" thereon. This obvious purpose and reason for the limitation comports with congressional concern for the exercise by Congress of its authority in this permissible but "decisive" manner.

This suggestion of moothess is advanced only on the assumption, arguendo, that Section 2870, Mississippi Code, and the actions taken thereunder by Adams and Forrest Counties come within the purview of the Voting Rights Act of 1965, which assumption is emphatically denied.

III.

Private Parties Lack Standing to Initiate Proceedings to Enforce Section 5 of the Voting Rights Act of 1965

The United States in Footnote 7 of its Memorandum raises and at the same time attempts to resolve the question whether these Appellants had the right to institute these actions to enforce the proscription contained in Sec-

tion 5 of the Act. We agree with the United States that the question is present, but disagree that it is resolved in favor of the right of Appellants to bring these actions but submit that it is resolved against such right. This is a jurisdictional question which was raised and urged by Appellees in the trial court by their Motions to Dismiss for Lack of Jurisdiction but because of the disposition by that Court in *Bunton, et al.* v. *Joe T. Patterson, et al.*, No. 26, which disposition was made immediately prior to the argument in *Fairley* v. *Patterson*, No. 25 (these cases), said question was not pressed. Further, said jurisdictional question, though not argued in Appellees' Motion to Dismiss or Affirm filed in this Court, was presented by Appellees moving this Court to dismiss the appeal. If Appellees had based their Motion solely on the ground that no substantial question on the merits had been raised or presented the Motion would have been only a motion for summary affirmance but since Appellees were aware of the jurisdictional questions involved in these cases, they moved the Court for a *dismissal* or in the *alternative* a *summary affirmance of the Judgments.*

We suggest to the Court that the question of whether these Appellants have a right to bring these actions as private citizens is a more serious jurisdictional question than the jurisdictional question posed by the convening of the three-judge courts. As readily admitted by the United States, since it could do no less, the "Voting Rights Act itself does not expressly provide for private suits to enforce Section 5 . . ." (Memorandum for The United States, Footnote 7.) The United States then attempts to resolve this question of jurisdiction by merely stating that it "would *seem* to be conferred on the District Courts by 28 U.S.C. 1343 (4)." (Emphasis added) (Footnote 7) This indecisive statement, lacking all legal support, does not square

with the position previously taken by the United States in its Memorandum that these actions were brought under and by virtue of Section 5 of the Act. It appears that the United States is attempting to have its cake and eat it too. We submit that the United States has decided in advance where it wants to go and in its Memorandum is making a futile attempt to get there.

As we read the Voting Rights Act of 1965, and particularly Section 5, thereof, it confers no rights upon any private citizens, but is merely a remedial statute by which the right to vote guaranteed by the Fifteenth Amendment to the Constitution of the United States will be vindicated.

The United States contends that Section 5 of the Act "explicitly confers upon individual citizens a *right* . . ." (Emphasis added) (Memorandum for the United States, Footnote 7) This contention finds no support in *South Carolina* v. *Katzenbach*, 383 U.S. 301, but is, in fact, refuted by the Opinion therein. This Court said at page 308 that: "[T]he Act creates stringent new remedies . . ." and addressing itself specifically to Section 5 remarked that "Section 5 prescribes a second *remedy* . . ." (Emphasis added) (383 U.S. at page 316)

Further, while focusing on Section 5 of the Act, the section which the United States points to as conferring a *right*, this Court opined that "[A]n appropriate *remedy* is a judicial determination that continued suspension of the new rule is unnecessary to *vindicate rights guaranteed by the Fifteenth Amendment.*" (Emphasis added) (383 U.S. 335)

Dispositive of the question whether this Act creates certain new voting *rights* or only secures and protects existing voting rights guaranteed by the Fifteenth Amendment to the Constitution of the United States is the language of this Court that:

"South Carolina contends that the cases cited above are precedents only for the authority of the judiciary to strike down state statutes and procedures—that to allow an exercise of this authority by Congress would be to rob the Courts of their rightful constitutional role. On the contrary, § 2 of the Fifteenth Amendment expressly declares that 'Congress shall have power to enforce this article by appropriate legislation.' By adding this authorization, the Framers indicated that Congress was to be chiefly responsible for *implementing the rights created in § 1.* 'It is the power of Congress which has been enlarged. Congress is authorized to *enforce* the prohibitions by appropriate legislation. Some legislation is contemplated to make the [Civil War] amendments fully effective.' Ex parte Virginia, 100 U.S. 339, 345, 25 L. Ed. 676, 679. Accordingly, in addition to the courts, Congress has full *remedial powers to effectuate the constitutional prohibition against racial discrimination in voting.*" (Emphasis added except "enforce") *South Carolina* v. *Katzenbach,* 383 U.S. 301, 325, 326.

A reading of the Act reveals that the enforcement, thereof, is exclusively in the Attorney General of the United States. This is confirmed by this Court's comment that:

"[A]fter enduring nearly a century of widespread resistance to the Fifteenth Amendment, Congress has marshalled an array of potent weapons against the evil, *with authority in the Attorney General to employ them effectively.*" (Emphasis added) *South Carolina* v. *Katzenbach,* 383 U.S. 301, 337.

It is inconceivable that the Congress of the United States intended to place in the hands of any and all private citizens authority to enforce Section 5 of the Voting Rights Act. As announced by this Court in discussing said Section 5 of the Act in *South Carolina* v. *Katzenbach,* supra, 334:

> "[T]his may have been an uncommon exercise of congressional power, as South Carolina contends, but the court has recognized that exceptional conditions can justify legislative measures not otherwise appropriate."

Appellees fail to comprehend how it could be seriously contended that the enforcement of such an "uncommon exercise of congressional power" and "extraordinary power to veto" in the Attorney General would be exposed to the whim of any disgruntled private citizen.

Further, this Court continuing to allude to Section 5 of the Act, stated at page 335 that:

> "[A] state or political subdivision wishing to make use of a recent amendment to its voting laws therefore, has a concrete and immediate 'controversy' *with the federal government.*" (Emphasis added)

This Court did not hold, at any place in its Opinion that authority was in private citizens to "employ" the "array of potent weapons" contained in the Act or that the enforcement of any voting laws created a "controversy" between a State or political subdivision thereof and a private citizen or citizens.

Assuming, arguendo, that the statute and actions taken by the Appellee counties thereunder, presently before this Court, come within the purview of the Voting Rights Act of 1965, these actions could have been mooted at any time by the State of Mississippi, or Adams County, or Forrest County, submitting said statute and actions thereunder to the Attorney General of the United States and he approving same. The Appellants in these actions would have had no standing in any Court to object to the action of either the Appellees, the State of Mississippi, or the Attorney General. It is difficult to conceive of a right of action which can so readily be extinguished without the approval of the party or parties in which the right allegedly exists.

It is apparent throughout the Act and as stated by the United States in its Memorandum that the only purpose for this proviso in Section 5 of the Act is to inform the Attorney General of any new voting laws to be enforced in a State covered by the Act. It was never intended as a proviso to inform private citizens of such actions taken by a State and never intended to vest any right or authority in any private citizen. The only remedy conferred upon a private citizen by the Act is found in Section 5 thereof which, as the United States points out in its Memorandum at page 8, is to not be "denied the right to vote for failure to *comply* with such" new voting laws. (Emphasis added) This position comports with the position Appellees took in their Motion to Dismiss or Affirm filed in this Court.

We suggest to the Court that Congress intended, as this Court has stated, to "marshal an array of potent weapons against the evil, with authority in the Attorney General to employ them effectively." We submit that Congress, realizing that the enactment of Section 5 of the Act was an "uncommon exercise of congressional power", was insistent that any confrontation with a sovereign state or political subdivision thereof be with the United States only. For the good order of the Republic, Congress could have done no less. It is almost ludicrous to even suggest that the Congress of the United States would demean a great and sovereign state to a position whereby a private citizen could veto a statute enacted by such state and enjoin the operation of same without the necessity of first alleging and proving that the statute is unconstitutional.

This Court, in discussing said Section 5 in *South Carolina* v. *Katzenbach,* 383 U.S. 301, 335, declared that "[T]he Act automatically suspends the operation of voting regulations enacted after November 1, 1964, and furnishes mechanisms for enforcing the suspension . . ." We suggest that this is a clear indication by this Court that such enforcing

mechanisms are confined within the four corners of the Act. A search within these confines fails to disclose any authority, express or implied, for a private citizen to institute an action to enforce the proscription contained in Section 5 of the Act.

Appellees are at a loss to understand the position taken by the United States of asserting that individual citizens have standing to institute a proceeding to enforce a substantive requirement of the Voting Rights Act of 1965. This loss is caused by the fact that in its "Memorandum in Support of Plaintiffs' Motion to Convene a Three-Judge Court and in Opposition to the Motion of Third Parties to Intervene as Defendants" filed June 17, 1966, in *Apache County* v. *United States,* Civil Action No. 292-66 in the United States District Court for the District of Columbia, at Page 9 thereof the United States asserted that:

> "[T]he Attorney General has *exclusive* responsibility to enforce the substantive requirements of the Voting Rights Act, and most of the enforcement is accomplished administratively. See Sections 4(b), 5, 6, 7, 8 and 9." (Emphasis added)

If the Attorney General ever had *exclusive* responsibility to enforce the substantive requirements of the Voting Rights Act and in particularly Section 5 thereof, then the said Attorney General should still have *exclusive* responsibility since Appellees are without knowledge of any amendment to the Voting Rights Act of 1965 which would divest the Attorney General of such *exclusive* responsibility.

As stated in *Apache County* v. *United States,* 256 F. Supp. 903, Page 906:

> "[B]ut the right enforced by this remedy [Voting Rights Act of 1965] is a *public right* appertaining not to individual citizens, but to the United States itself—

> called upon by Congress in implementing the Fifteenth Amendment, to vindicate the right of all citizens of the United States collectively to be free from discrimination in any part of the United States on account of race or color. This *public right* and remedy are supplementary to but analytically distinct from the individual rights of those discriminated against by or in the areas involved." (Emphasis added)

Although the quoted language was directed toward Section 4(a) of the Act the rationale of said language is equally applicable to Section 5 of said Act.

The United States asserts that the special authorization conferring standing on the Attorney General to institute proceeding to enforce the provisions of the Voting Rights Act of 1965 was inserted in the said Act since the Attorney General "might otherwise not be deemed empowered to vindicate private rights. See *United States* v. *Raines*, 362 U.S. 17, 27." (Memorandum for United States As Amicus Curiae, Page 9, Footnote 7)

The United States, under the Voting Rights Act of 1965, is not vindicating private rights, but as stated in *Apache County*, is vindicating a *public right*. Further, this is the rationale of *United States* v. *Raines*, 362 U.S. 17, when this Court stated at Page 27 that:

> "[B]ut there is the highest *public interest* in the due observance of all the constitutional guarantees, including those that bear the most directly on private rights and we think it perfectly competent for Congress to authorize the United States to be the guardian of that *public interest* in a suit for injunctive relief." (Emphasis added)

What the United States District Court for the District of Columbia and this Court were saying is that the United States, when it institutes a proceeding either under 28 U.S.C. 1971 or the Voting Rights Act of 1965 is vindicating

a *public right* and *public interest* and only indirectly a private right or private interest. As noted in *Apache County* v. *United States*, supra:

> "[C]ongress has specifically provided that a person who under color of state law deprives a United States citizen of any right secured by the Constitution and Laws 'shall be liable to the party injured in an action at law, suit at equity, or other proper proceeding for redress.' R. S. Section 1979, 42 U.S.C. 1983."

The Appellants cite Section 12(f) of the Voting Rights Act of 1965 and attempt to gain mileage therefrom on the theory that since Congress used the word "person" rather than "the Attorney General" it must have contemplated suits by private parties under the Act. We invite the Court's attention to Section 12(e) of the Act which authorizes the Attorney General to file with the District Court "an application for an order providing for the marking, casting, and counting of the ballots of such persons [those eligible to vote who were denied the right to vote] and requiring the inclusion of their votes in the total vote before the results of such election shall be deemed final and any force or effect given thereto." In this particular type of action the district court would lack jurisdiction unless the person denied the right to vote exhausts his administrative or other remedies in absence of the provision of Section 12(f).

Further, we suggest to the Court that it is significant that in said Section 12(f) Congress saw fit to use the phrase "a person asserting rights" rather than the phrase "parties aggrieved" which appears in Section 1971d, 42 U.S.C. The phrase "person asserting" includes any individual who notifies the Attorney General of the United States that his voting rights secured by the Voting Rights Act of 1965 have been infringed whereas the phrase "party aggrieved" includes only individuals who have actually instituted proceedings to enforce their voting

rights. We suggest to the Court that the use of the word "person" in one Section and "party" in another Section was not a mere substitution of words with equal import but has significant legal ramification.

The cases cited by the Appellants on Page 11 of their Brief do not support Appellants' position because from the legislative history of the Voting Rights Act, from the language of the Act itself and from the assertion of the United States in the aforementioned Brief filed in *Apache County* v. *United States,* supra, "exclusive responsibility to enforce the substantive requirements of the Voting Rights Act" is reposed in the Attorney General of the United States. All cases cited by the Appellants would have been decided differently had the statutes indicated that private persons though injured by violations of such statutes were not authorized to institute proceedings thereunder. *Goodman* v. *H. Hentz & Co.,* 265 F. Supp. 440, 447. Further, as stated in *Apache County,* and as admitted by Appellees, Appellants are nowise precluded from filing an action in the United States District Court for the Southern District Court of Mississippi and alleging therein invidious discrimination.

IV.

Section 2870 of the Mississippi Code of 1942, As Amended, by the 1966 Session of the Mississippi Legislature and the Actions Taken Thereunder by the Counties of Forrest and Adams Do Not Come Within the Purview of Section 5 of the Voting Rights Act of 1965 (42 U.S.C. 1973c)

These actions were purportedly brought by two classes of individuals. One class represents individuals who seek or desire to seek the Office of Supervisor and the other class represents the individual voters who cast their votes in the elections for Boards of Supervisors. As to the class

representing the candidates, we submit to the Court that the Voting Rights Act of 1965 in no way applies to such candidates, and submit that the colloquy between Representative Corman and the Honorable Burke Marshall found at Page 74 of the Hearings before Subcommittee Number 5 of the Committee on the Judiciary, House of Representatives, Eighty-Ninth Congress, First Session on H.R. 6400, Serial No. 2 and here set out for the convenience of the Court forecloses further argument in this regard.

> "MR. CORMAN: We have not talked at all about whether we have to be concerned with not only who can vote, but who can run for public office and that has been an issue in some areas in the South in 1964. Have you given any consideration to whether or not this bill ought to address itself to the qualifications for running for public office as well as the problem of registration?
>
> MR. MARSHALL: The problem that the bill was aimed at was the problem of registration, Congressman. If there is a problem of another sort, I would like to see it corrected, but that is not what we were trying to deal with in the bill."

As to the remaining class purported to be represented in these actions, we submit to the Court that Section 2870, Mississippi Code, as amended, is not embraced within or covered by the proscriptive provisions of Section 5 of the Voting Rights Act of 1965 (42 U.S.C. 1973c). The Voting Rights Act of 1965 is entitled: "An Act to Enforce the Fifteenth Amendment to the Constitution of the United States and for Other Purposes." The Act does not grant the right to vote. It only prescribes procedural rules and regulations whereby that right, protected by the Fifteenth Amendment to the Constitution, may be insured and guaranteed.

It is a matter of common knowledge of which this Court can take judicial notice that the 1965 Voting Rights Act was prepared in the main by the Attorney General of the United States at the request of the President. On March 15, 1965, the President addressed a joint Session of Congress. The President made it perfectly plain what this Bill sought to do. We find his explanation on Page 4924 of the House Congressional Record when he said:

> "This bill will strike down restrictions to voting in all elections—Federal, State, and local—which have been used to deny Negroes the right to vote.
>
> This bill will establish a simple, uniform standard which cannot be used however ingenious the effort to flout our Constitution.
>
> It will provide for citizens to be registered by officials of the U.S. Government if the State officials refuse to register them.
>
> It will eliminate tedious, unnecessary lawsuits which delay the right to vote.
>
> Finally, this legislation will insure that properly registered individuals are *not prohibited from voting.*" (Emphasis added)

These consolidated cases involve a question that turns upon construction of a Federal Statute. Most relevant to the construction of a Federal Statute is the very language which Congress has expressed its policy and from which the Court must extract the meaning most appropriate. *Local 1976, U.B.C. & J.* v. *N.L.R.B.*, 357 U.S. 93.

Section 5 uses the words "qualification", "prerequisite", "standard", "practice", or "procedure", five different times. They do, in each instance where they are used, refer only to "voting" which is defined in the Act by Section 14(c)(1) thereof.

The definition of "voting" or "vote" is broad enough to insure that the votes of all citizens should be cast, counted, ". . . and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election."

Thus, it is clearly shown that the words, "qualification", "prerequisite", "standard", "practice", or "procedure" are to be applied exclusively to "vote" or "voting", as those words apply to the appropriate totals and offices and propositions upon which the vote is to be taken.

> "The maxim 'noscitur a sociis,' that a word is known by the company it keeps, while not an inescapable rule, is often wisely applied where a word is capable of many meanings, in order to avoid the giving of unintended breadth to Acts of Congress." *Jarecki* v. *G. D. Searle & Co.*, 367 U.S. 303.

We submit to the Court that the above quoted words from the company they keep are limited as they apply to "vote" or "voting" and do not apply to the candidates who are voted upon.

The Amendment to Section 2870 of the Mississippi Code has nothing whatsoever to do with qualifications, prerequisites, standards, practices or procedures dealing with vote or voting, but deals exclusively and solely with the method by which the Supervisors of a County will be elected. Determination of the method by which the vote is to be taken is a matter within the inherent and exclusive jurisdiction of the States and was not in any way altered or amended by the Voting Rights Act of 1965.

In *South Carolina* v. *Katzenbach*, 383 U.S. 301, this Court stated that:

> "[T]he act automatically suspends the operation of voting regulations enacted after November 1, 1964, and furnishes mechanisms for enforcing the suspension."

The Court's attention is invited to one of these mechanisms which is contained in Section 5 of the Act (42 U.S.C. 1973c). This Section contains the proviso that in the event a State or political subdivision shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or in effect on or before November 1, 1964, without having same first approved by the Attorney General of the United States either affirmatively, or by his failure to object of by the United States District Court for the District of Columbia then "no person shall be denied the right to vote for failure to *comply* with such qualification, prerequisite, standard, practice, or procedure." (Emphasis added)

Black's Law Dictionary defines "comply" as "to yield, accommodate, or to adapt one's self to, to act in accordance with." We suggest to the Court that the use of the word "comply" in the Act by Congress clearly shows that the qualification, prerequisite, standard, practice, or procedure contemplated in the Act were of a nature by which a person had to perform an act in the process of registering and/or voting. Section 2870 of the Mississippi Code, as amended, in no way calls upon a person to perform any new or additional act in the voting procedure applicable prior to November 1, 1964, except to permit a person to cast a vote for four additional candidates for the Board of Supervisors of the County in which the person resides.

This mechanism in the Act whereby a person has the right to vote without *complying* with a voting qualification or prerequisite to voting, or standard, practice, or procedure, with respect to voting different from that in force or effect on November 1, 1964, in truth and in fact, contemplates a new obstacle placed in the path of an individual in the voting procedure and allows that individual to cast

his vote, have it counted and included in the appropriate totals of votes cast with respect to candidates and propositions without *complying* with said new procedure. Section 2870, Mississippi Code, as amended, does not concern itself with any act which a person could refuse to *comply* with before voting and the procedure incident thereto.

An application of the plain and unambiguous language of the Act to the amendment now in question makes it clear that this amendment is not covered by or within the purview of the restriction on new voting regulations imposed by Congress. The Statute, being clear and unequivocal on its face, relieves the Court of the task of resorting to legislative history. *United States* v. *Oregon*, 366 U.S. 643, and *United States* v. *McKesson & Robbins, Inc.*, 251 U.S. 305.

While it is unnecessary to resort to legislative history, we find that such history supports the conclusion that the Act does not apply to Section 2870, as amended, of the Mississippi Code.

On Page 172 of the Hearings Before the Senate Judiciary Committee, Attorney General Katzenbach stated that the reason for the provision in the Voting Rights Act of 1965, now under scrutiny by this Court, was that in absence of "a provision of this kind, you leave it open to a state to devise, if it can, some new method of *preventing people from voting* on grounds of race, * * *." (Emphasis added) The Attorney General further stated in way of example that as the government "won lawsuits in three States, three States decided to change the *qualifications for voting*, and we had to litigate the *new qualifications for voting*." (Emphasis added)

Later, in the Attorney General's testimony on Page 237 of the said Senate Judiciary Committee Hearings in referring to 42 U.S.C. 1973c appears the following:

SENATOR ERVIN: "Since the bill does not intend to affect anything except tests or devices as defined in the bill, and any test or device that is contrary to the bill would already be null and void if the bill is constitutional, why in the world do you have to have a court test before a State can change its law?"

ATTORNEY GENERAL KATZENBACH: "Well, Senator, it may be redundant insofar as it uses the word 'Qualifications,' if you equate qualifications with tests or devices.

It occurred to us that there are other ways in which states can discriminate, and we have had experience with State legislative efforts in other areas, for example, limiting the registrars to very short periods of time, or the imposition of either very high poll taxes or property taxes which would have the effect of denying or abridging rights guaranteed under the 15th amendment, that kind of law should be covered too.

This was put in with an effort of not letting a State legislature continue past practices of discrimination, preventing that or subjecting that to judicial review, somewhat the same way that State reapportionment plans are subjected to judicial review in order to determine their constitutionality."

SENATOR ERVIN: "Well, you have a provision in this bill to the effect that an examiner can go and order people registered.

ATTORNEY GENERAL KATZENBACH: "Yes, Sir."

SENATOR ERVIN: "And an examiner is told to disregard State devices—'

ATTORNEY GENERAL KATZENBACH: "Yes. I do not think this is necessary with respect to tests and devices, and I do not suppose that tests and devices could be questioned under it.

But the effort here was to get at things that were not included within the words 'tests' and devices.' And the thought that other things that violated the 15th amendment by a State should also be subjected to judicial review."

SENATOR ERVIN: "It seems to me that is a drastic power which can hardly be reconciled with the federal system of government, if we still have a federal system of government."

ATTORNEY GENERAL KATZENBACH: "I think it is quite a strong power, Senator. The effort is to prevent this constant slowing down process which occurs when States enact new laws that may clearly be in violation of the 15th amendment, but you have to go through the process of getting judicial determinations of that. It takes a long time. In the interval the purposes of the act are frustrated.

Now, there may be better ways of accomplishing this. I do not know if there are. *There are some here I can imagine, a good many provisions of State law, that could be changed that would not in any way abridge or deny the right*; and we, perhaps, except for the fact that some members of the committee, I think, including yourself, have had difficulty with giving the Attorney General discretion on some of these things—perhaps this could be improved by applying it only to those laws which the Attorney General takes exception to within a given period of time. Perhaps that would remove some of the burdens." (Emphasis added).

During the debates in the United States Senate on the Voting Rights Act of 1965, Senator Mansfield stated on the floor of the Senate the following:

"FOURTH. As I mentioned earlier a great deal of ingenuity has been shown on occasion in enacting novel approaches to continue systematic exclusions after a particular device has been outlawed by the

courts. To insure the effectiveness of all action in adopting this act, we provide that no State or political subdivision which has been precluded under this act from enforcing tests or devices may enforce new qualifications or procedures until a Court rules that such *new qualifications* will not frustrate the mandate of the Fifteenth Amendment. This, of course, is merely a common-sense method of insuring that literacy tests and similar devices are not replaced by other vehicles of discrimination as soon as the ban on literacy tests take effect."—April 22, 1965, Congressional Record—Senate, Page 8297. (Emphasis added)

Appellants lay great stress on the use of the terms "standards, practices, or procedures" as used in the Statute and cite an exchange between Attorney General Katzenbach and Senator Fong in the hearing before the Judiciary Committee in the Senate. We find this exchange on Page 191 of the hearing before the Judiciary Committee. Senator Fong and Attorney General Katzenbach are discussing Section 2 of the Bill, which is Section 1973 of Title 42, not Section 1973c of this Title. Senator Fong was concerned about the use of the word "procedure" in connection with the question of voting qualification or prerequisite. He used this example to show what he meant:

"SENATOR FONG: For example, if there should be a certain statute in a state that says the registration office shall be open only 1 day in 3, or that the hours will be so restricted, I do not think you can bring such a statute under the word 'procedure'. Could you?

ATTORNEY GENERAL KATZENBACH: I would suppose you could if it had that purpose. I had thought of the word 'procedure' as including any kind of practice of that kind if its purpose or effect

was to deny or abridge *the right to vote on account of race or color.* (Emphasis added)

SENATOR FONG: The way it is now written, do you think there may be a possibility that the court would hassle over the word 'procedure'? Or would, probably, it allow short registration days or restricted hours to escape this provision of the statute?

ATTORNEY GENERAL KATZENBACH: I do not believe so, Senator, although the Committee might consider that. The language was used in the 1964 Act on a similar matter, did use the terms 'standards, practices, or procedures.' Perhaps that would be broader than simply the word 'procedure' and perhaps the committee might consider making that point clear.

SENATOR FONG: You would have no objection to expanding the word 'procedure'?

ATTORNEY GENERAL KATZENBACH: No, it was intended to be all-inclusive of any kind of practice.

SENATOR FONG: I know that in section 3(a) you have very much in detail spelled out the words, 'test or device'. (Referring to 1973b)

ATTORNEY GENERAL KATZENBACH: Yes.

SENATOR FONG: But you have not spelled out the word 'procedure'. I think that the word 'procedure' should be spelled out a little more.

ATTORNEY GENERAL KATZENBACH: I think that is a good suggestion, Senator.'

The Bill was amended so as to substitute the words "standards, practices or procedures" in lieu of the simple word "procedure". This was done in 1973 as well as 1973c; but it is plain to see that it had to do with the

right to register to vote; and did not pertain to the method of electing candidates for office.

We further invite the Court's attention to the remarks of Attorney General Katzenbach when he appeared before the House Committee on the Judiciary to explain the provisions of the Voting Rights Act of 1965. The Attorney General stated at Page 11 of Hearings Before Subcommittee No. 5 of the Committee on the Judiciary, House of Representatives, Eighty-Ninth Congress, First Session on H. R. 6400 that:

> "[T]he bill also contains a provision dealing with the problem of attempts by states within its scope to change present *voting qualifications*." (Emphasis added)

This comment was addressed to what now is Section 5 of the Voting Rights Act of 1965

At a later point during the testimony of the said Attorney General, we find the following colloquy directed toward the said Section 5 of the said Act

> "THE CHAIRMAN. In other words, your language on page 7, line 25 is all-sweeping and covers the enactment of any law on voter *qualifications*.
>
> MR. KATZENBACH. That is correct, Mr. Chairman." (House Hearings, Page 60) (Emphasis added)

Later, during an exchange with Senator Ervin, the Attorney General in discussing what is now Section 5 of the Act stated that it was "quite a strong power" but that the effort was to "prevent this constant *slowing down process* which occurs when states enact new laws that may be clearly in violation of the Fifteenth Amendment. . . ." (Emphasis added) (Page 237) It is quite obvious from this comment by Attorney General that he was discussing laws dealing with registration and/or voting procedure.

In no way could the action of a state or political subdivision thereof in reapportioning or redistricting be regarded as a slowing down process.

The sum total of the remarks directed to 42 U.S.C. 1973c in the Congressional Committee Hearings and the floor debates is that Congress was only concerned with qualifications, prerequisites, standards, practices, and procedures which conceivably could be enacted or enforced by a State or political subdivision thereof which would have the effect of achieving the same discriminatory results as the tests and/or devices suspended by Section 4 of the Act (42 U.S.C., Section 1973b(a)). These tests and devices as shown by the definition placed upon them by Congress in 42 U.S.C. 1973b(c) dealt entirely with a person's right to vote and not with any matter controlled by Section 2870, Mississippi Code, as amended.

We suggest to the Court that it is of great moment that 42 U.S.C. 1973c is no longer applicable to a State or political subdivision once that State or political subdivision has come out from under Section 1973b(a) of 42 U.S.C. This clearly shows the intent of Congress to include in the terms "qualifications", "prerequisites", "standards", "practices", or "procedures" only those acts of a State or a political subdivision thereof which would discriminate as to the exercise of the right to vote because of his race or color.

At Page 16 of Appellants' Brief filed with this Court Appellants state that:

> "[E]arlier in the hearing, he [Mr. Katzenbach] gave examples of changes which would not be covered [by 42 U.S.C. 1973c]—changes in voting age, resident requirements, and balloting procedures such as changing from paper ballots to machine * * *."

Surely, if as Appellants contend in their Brief, these changes are not within the purview of Section 5 of the

Voting Rights Act of 1965 (42 U.S.C. 1973c), then Section 2870, Mississippi Code 1942, as amended, could not conceivably fall within the purview of said Section 5 of the Act.

Section 5 of the Act should be given a narrow interpretation in view of the fact that its provision is an extraordinary one. This Court in *South Carolina* v. *Katzenbach*, supra, noted that:

> "[T]his may have been an uncommon exercise of congressional power, as South Carolina contends, but the Court has recognized that exceptional conditions can justify legislative measures not otherwise appropriate."

Section 2870, Mississippi Code 1942, as amended, in no way denies or abridges the right of Appellants to vote because of race or color as prohibited by the Fifteenth Amendment to the Constitution of the United States. In response to the teachings of *Baker* v. *Carr*, 369 U.S. 186, and *Reynolds* v. *Sims*, 377 U.S. 533, and their progeny, the Mississippi Legislature during its regular session of 1966, exercising its legislative wisdom under and by virtue of Section 170 of the Mississippi Constitution of 1890, amended Section 2870 of the Mississippi Code of 1942. Although this Court had not at that time held that a County political subdivision was compelled under the equal protection clause to redistrict itself on an equal basis, the United States District Courts of Mississippi have held that such was portended by such teachings of this Court.

The adoption of Orders by the Adams and Forrest Counties Boards of Supervisors whereby the Members of said Boards were to be voted upon by the electorate of each County at large brought these Counties within the ambit of the rationale of *Baker* v. *Carr*, supra, and *Reynolds* v. *Sims*; supra. The rule of "one-man, one-vote," is now a reality in the Counties of Adams and Forrest.

Appellants' right to vote has in no way been denied or abridged by the actions of the Appellees' Boards. Rather than having their votes diluted, as argued by the Appellants, the power of their votes has been increased. Whereas before a voter in a District only cast a vote for a candidate residing in his District under the present method of electing Members of the Boards of Supervisors of Adams and Forrest Counties the same voter cast a ballot for four additional candidates. Under the law of Mississippi the Board of Supervisors can only act as a unit, and then only when the Sheriff and Clerk of the Board are in attendance. (Section 2873, Mississippi Code 1942) This voter can now exert on and have his voting influence felt by not only one member of the Board of Supervisors, but on all five of the members. As stated by this Court in *Fortson* v. *Dorsey*, 379 U.S. 433:

> "Each District's Senator must be a resident of that District, but since his tenure depends upon the county-wide electorate he must be vigilant to serve the interest of all the people in the county, and not merely those of people in his home district; thus, in fact he is the county's and not merely the District's Senator."

The Amendment to Section 2870, Mississippi Code 1942, authorizes changes in the method of electing Members to the Boards of Supervisors similar to changes which occur in legislative and congressional reapportionment.

The Congressional Redistricting Statute passed by the Mississippi Legislature effective during the 1966 Congressional election was held to be valid and constitutional by an unpublished opinion of the District Court and affirmed by this Court. *Connor, et al.* v. *Johnson, et al.*, No. 999 (1967) 386 U.S. 483.

South Carolina v. *Katzenbach*, supra, stated with clarity that South Carolina, Alabama, Alaska, Georgia,

Louisiana, Mississippi, Virginia, twenty-six counties in North Carolina and one county in Arizona had been brought within the coverage formula of the Voting Rights Act of 1965 on August 7, 1965. Subsequent to that time legislative apportionment and/or congressional redistricting have been before the Courts in each of those States. South Carolina—*O'Shields* v. *McNair*, 254 F. Supp. 708; Alaska—*Wade* v. *Nolan*, 414 P.2d 689; Georgia—*Tombs* v. *Fortson*, 241 F. Supp. 65, aff., 384 U.S. 210 (May 16, 1966); Louisiana—*Bannister* v. *Davis*, 263 F. Supp. 202; Mississippi—*Connor* v. *Johnson*, supra; Virginia—*Mann* v. *Davis*, 245 F. Supp. 241, aff., 382 U.S. 42 (October 25, 1965); North Carolina—*Drum* v. *Seawell*, 249 F. Supp. 877, aff., 383 U.S. 831 (April 4, 1966); and Arizona—*Klahr* v. *Goddard*, 250 F. Supp. 537.

Some of the cases as above noted were considered and reviewed by this Court. It is significant that such changes, both by the Legislatures of the States covered and the Courts of those States, were in total disregard of the proscriptive provisions of Section 5 of the Voting Rights Act of 1965 (42 U.S.C. 1973c). It is submitted that the reason for this is that such proscriptive provisions were not even thought to apply to these changes. This Court and the Members thereof were well aware of the Voting Rights Act of 1965 and the provisions of Section 5 thereof, having dealt with said Act in *South Carolina* v. *Katzenbach*, supra, decided March 7, 1966. Although this question was not presented in the aforementioned cases, under familiar principles, the cases would have been decided on the basis of law controlling at the time the Court rendered its decisions, and therefore the provisions of Section 5 of the Voting Rights Act of 1965 would have been applicable to these litigations. *Foundries* v. *Tri-City Cent. Trades Council*, 257 U.S. 184. *United States* v. *Alabama*, 362 U.S. 602. Thus, this Court, in exercising jurisdiction in the above men-

tioned cases, sub silentio, *decided that changes in regard to congressional redistricting and legislative reapportionment were not within the purview of Section 5 of the Voting Rights Act of 1965.*

This Court approved a method of electing members of the City Council of Virginia Beach, Virginia, similar to the method of electing Members to the Boards of Supervisors of Adams and Forrest Counties. *Dusch, et al.* v. *Davis, et al.*, 18 L.Ed.2d 656. The method used by Virginia Beach, Virginia, was under a charter amendment enacted during the 1966 session of the Virginia State Legislature. Virginia, like Mississippi, is controlled by the proscriptive provision of Section 5 of the Voting Rights Act of 1965.

Virginia Beach, Virginia, did not submit the change in its method of electing city councilmen to the Attorney General of The United States nor did it have said method approved by the United States District Court for the District of Columbia. This plan, enacted after November 1, 1964, was approved by the United States District Court for the Eastern District of Virginia, disapproved by the United States Court of Appeals for the Fourth Circuit and then *approved by this Court in a decision dated May 22, 1967.*

If this change in the method of electing councilmen of Virginia Beach, Virginia, which is almost identical to the change adopted in Adams and Forrest Counties, Mississippi, comes within the purview of Section 5 of the Voting Rights Act of 1965 (42 U.S.C. 1973c), then the United States District Court for the Eastern District of Virginia lacked jurisdiction to entertain this cause of action. Jurisdiction for the approval of a change in the voting procedure of a state or political subdivision, thereof, enacted or enforced after November 1, 1964, when said state or political subdivision is controlled by Section 5 of the Voting Rights Act of 1965, is in a court of three judges in the United States

District Court for the District of Columbia only, as provided by the Act. This court would have lacked jurisdiction to entertain the appeal since the District Court lacked jurisdiction and, therefore, would have been compelled to dismiss the appeal upon the court's own motion; the court and the members thereof being well aware of the Voting Rights Act of 1965, and Section 5, thereof, having had said act before them in *South Carolina* v. *Katzenbach*, supra, decided March 7, 1966. We suggest to the Court that since this court was aware that Virginia was brought within the coverage formula of the act on August 7, 1965, in approving the Virginia Beach, Virginia, change, this Court, sub silentio, found that such change did not come within the purview of Section 5 of the Voting Rights Act of 1965. We further suggest to the court that since the change enacted in 1966 by the legislature of Virginia allowing Virginia Beach, Virginia, to elect seven members of its city councilmen at large, while requiring at least one member to reside in each of the seven boroughs, is perfectly analogous to Section 2870, Mississippi Code, as amended, by which the Legislature of Mississippi in 1966 allowed the Counties of Mississippi to provide that the five members of the county boards of supervisors be elected at large while requiring one member to reside in each of the five districts of the county. Therefore, we respectfully submit to the Court that Section 2870, Mississippi Code, as amended, and the actions taken thereunder, and pursuant thereto, by the counties of Adams and Forrest, appellees herein, do not come within the purview of, and are not covered by, Section 5 of the Voting Rights Act of 1965 (42 U.S.C. 1973c).

Appellants, in their brief, seek comfort from *Sellers* v. *Trussell*, 253 F. Supp. 915 (M.D. Ala. 1966). A reading of this case readily reveals that the decision in *Sellers* did not turn on a holding that the action taken by the Alabama Legislature, during its regular session of 1965, in extending

by two years the terms of the incumbent county commissioners of Bullock County, Alabama, was such a change in the voting procedure that it came within the purview of Section 5 of the Voting Rights Act of 1965 (42 U.S.C. 1973c). This was a three judge court of Alabama, composed of Circuit Judge Rives and District Judges Grooms and Johnson.

Judge Rives based his decision for enjoining the operation of that portion of Alabama Act number 536, which extended the terms of the incumbent commissioners, upon the grounds that: (1.) That portion of the act had an apparent discriminatory effect; and, (2.) That said act is in conflict with Section 5 of the Voting Rights Act of 1965 (U.S.C. 1973c).

Judge Johnson specially concurred with Judge Rives, but did not reach the question of the applicability of Section 5 of the 1965 Voting Rights Act (Section 1973c). His concurrence was based on a finding that Alabama Act number 536 was racially motivated and, therefore, its purpose and effect was discriminatory.

Judge Grooms concurred in the finding of Judge Rives that Alabama Act number 536 was not enacted because of racially discriminatory motives, but dissented as to the other findings by Judge Rives and Judge Johnson.

Therefore, *Sellers* merely stands for the proposition that the enforcement of that part of Alabama Act number 536 which extended the terms of the incumbent commissioners should be enjoined because the effect thereof was racially discriminatory.

It is worthy of note that Judge Rives, in finding that Alabama Act number 536 was in conflict with Section 5 of the Voting Rights Act of 1965 (42 U.S.C. 1973c), admitted at page 918 of 253 F. Supp. that:

> "[A] close question is presented as to whether Alabama must follow the procedures of that Section [Section 5 of the Voting Rights Act of 1965] in order to extend the terms of office of incumbent Bullock County officials and to postpone elections for two years."

The action taken by the Alabama State Legislature is in no way similar to Section 2870 of the Mississippi Code, as amended, and the actions taken thereunder, and by virtue thereof, by the counties of Adams and Forrest.

In the event the appellants' position should be sustained, then the effect, thereof, would be to overrule the decisions of this Court pertaining to the "one man, one vote" rule in the cases previously before this Court originating in those states covered by the Voting Rights Act of 1965. Further such holding would preclude any future litigation in the states covered by the Act as it pertains to complying with the mandates of this Court in reapportionment so as to have a truly representative form of government. To so hold would mean that the Congress, through the Voting Rights Act of 1965, has withdrawn from the local District Courts of the several states covered by Section 5 of the said Voting Rights Act jurisdiction to entertain such litigation by denying them the authority to approve or disapprove any actions taken by such states or political subdivisions, thereof, whereby said states or political subdivisions realign boundaries of voting districts so as to accomodate them to this Court's "one-man, one-vote" mandate.

We suggest to the Court that it is very significant that at all times during the Congressional Hearings and the debates on the floor of Congress whenever Section 5 of the Act was mentioned, the examples referred to by all individuals were examples dealing entirely with qualifica-

tions and procedures involving directly registration and/or voting. At no time did anyone ever mention reapportionment or redistricting as being covered by the said Section 5 of the said Act. In light of the fact that reapportionment and redistricting was at that time and is now a very live issue, the absence of any question directed to this issue appears highly significant.

This is especially so since on several occasions during the said Congressional Committee Hearings the Attorney General equated the legislative suspension of state voting laws with the principle of equity applied by the Federal Courts in reapportionment suits. (See House Hearings, Page 94 and Senate Hearings 237) But even though reapportionment was alluded to, no one asked or intimated that such was covered by the Act.

Moreover, to sustain the appellants' position would prevent the realignment of school districts, sometimes necessary in order to comply with the school segregation cases of *Brown* v. *Board of Education*, 347 U.S. 483, and 349 U.S. 294; *United States* v. *Jefferson County Board of Education*, 372 F.2d 836, and *Green* v. *County School Board of New Kent County*, ... U.S. ....., 20 L.Ed.2d 716.

In Mississippi and other states covered by the provisions of the Voting Rights Act of 1965, school trustees are elected by the qualified electors from the school districts and bond issues are voted on only by the persons living within a defined district, all of which have existed in the laws of Mississippi prior to November 1, 1964.

Obviously, it was not the intent of Congress, in the Voting Rights Act of 1965, to guarantee and enforce individual rights under the Fifteenth Amendment to the extent of defeating other rights guaranteed under the Fourteenth Amendment.

V.

This Court Should Not Set Aside the Elections Held Pursuant to Section 2870 of the Mississippi Code, As Amended, Even in the Event This Court Should Find That Said Section 2870, As Amended, Comes Within the Purview of Section 5 of the Voting Rights Act of 1965

In support of their contention that in the event this Court should find that Section 2870 of the Mississippi Code, as Amended, comes within the purview of Section 5 of the Voting Rights Act of 1965, this Court should set aside the elections held pursuant to said Section 2870, Appellants cite *Hamer* v. *Campbell*, 358 F.2d 215. *Hamer* does not support Appellants' position, but in fact, supports the position of the Appellees. This Court is committed to the proposition that "equitable considerations might justify a Court in withholding the granting of immediately effective relief in a legislative apportionment case, even though the existing apportionment scheme was found invalid." *Reynolds* v. *Sims*, 377 U.S. 533. This Court further stated in *Reynolds* that:

> "[W]ith respect to the timing of relief, a court can reasonably endeavor to avoid a disruption of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a State in adjusting to the requirements of the court's decree. As stated by Mr. Justice Douglas, concurring in Baker v. Carr, 'any relief accorded can be fashioned in the light of well-known principles of equity.'" (Page 585)

It is significant to note that in *Hamer* v. *Campbell*, supra, Circuit Judge Brown distinguished this Court's holding in *Reynolds* v. *Sims*, supra, on the ground that *Hamer* was concerned with the deprivation of the right to vote while *Reynolds* was concerned with dilution of the vote. The Circuit Court of Appeals for the Fifth Circuit

made other distinctions as to reapportionment cases. The Court stated at Page 222 that:

> "[A] court may properly withhold injunctive relief in order to allow the state to remedy dilution of the franchise."

We submit to the Court that even in the event that this Court finds that the said Section 2870 comes within the purview of Section 5 of the Voting Rights Act of 1965 that the only relief that should be granted would be relief directed toward the next elections involving the Supervisors of Forrest and Adams Counties. This comports with the rationale of *Sims* v. *Reynolds,* supra, *Roman* v. *Sincock,* 377 U.S. 695 and *Davis* v. *Mann,* 377 U.S. 678.

CONCLUSION

Appellees therefore respectfully submit that this Court must either dismiss these appeals for lack of jurisdiction or affirm the decision of District Court for the Southern District of Mississippi, Jackson Division, three judges sitting.

Respectfully submitted,

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